COM/LYN/tjl/mel **ALTERNATE DRAFT** Agenda ID #3811
Alternate to Agenda ID# 3683
Ratesetting
Item # 85a 8/19/04

ALTERNATE DRAFT DECISION OF COMMISSIONER LYNCH_____
(Mailed 8/5/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Point Arena Water Works, Inc. for an order authorizing a rate increase in rates subject to refund producing additional annual revenues of $70,137 or 56.9% for the test year 2002.	Application 02-11-057 (Filed November 25, 2002)

FINAL OPINION APPROVING SETTLEMENT OF TEST YEAR 2002 GENERAL RATE CASE

A. Summary

This decision approves the "stipulation" between Point Arena Water Works (PAWW) and the City of Point Arena (City), whereby PAWW and the City propose to resolve all but one of the issues in PAWW's rate increase application. This decision also decides the one remaining issue. The stipulation is attached to this decision.

B. Background

In Resolution (Res.) W-4356, October 24, 2002, the Commission granted PAWW a $70,137 or 56.9% rate increase, subject to refund. About a year earlier, the Commission had also granted PAWW a $47,677 or 62.3% rate increase, also subject to refund, based on a finding that such an increase was necessary to provide sufficient funds to meet PAWW's cash operating expenses with no depreciation or rate of return on rate base. The Commission noted that PAWW's

last rate case was in 1991, and that PAWW operated at a loss of $56,687 in 2000. As part of its review leading up to Res. W-4356, the staff conducted two public meetings in Point Arena and prepared an extensive staff report with accompanying audit of the utility's 2000 books of account.

The City objected to the rate increases requested by PAWW and disagreed with staff's review. At the staff's recommendation, the Commission converted this advice letter rate case to a formal proceeding in Resolution W-4356.

PAWW, staff, and the City also differed regarding the proper ratemaking treatment of an income tax refund to PAWW from the early 1990's. The staff auditor concluded from PAWW's records that (1) the tax refund had been obtained by PAWW at its own expense, and (2) the money had been used to meet operation and maintenance expenses that utility revenue failed to cover. Accordingly, the auditor recommended the tax refund not be used to lower prospective rates. The City disagreed. In Res. W-4356, the Commission included this issue in the formal proceeding.

On March 20, 2003, the assigned Administrative Law Judge (ALJ) convened a prehearing conference (PHC). The tax refund was among the matters discussed at the PHC, and the ALJ set a briefing schedule regarding the refund. The ALJ also set a procedural schedule for the remainder of this proceeding. As noted above, the rate increase proposals at issue here have been through an extensive informal review process with our staff, including an audit and a staff report. PAWW and our staff indicated at the PHC that they would rely extensively on these previously prepared analyses to make the required showing.

On April 8, 2004, the City and PAWW filed a stipulation that resolved all issues in the 2002 test year rate case, with one exception. The stipulation

provided that the one remaining issue, namely, refunds of certain overcharges, would be submitted to the assigned ALJ after briefing by the parties. PAWW filed its opening brief on April 22, 2004, the City followed with its brief on April 29, 2004, and PAWW submitted its responsive brief on May 13, 2004.

1. Description of the Stipulation

The stipulation provides that, with specified exceptions, the parties will agree to and not challenge the conclusions and recommendations for PAWW's test year 2002 general rate case set forth in Water Division staff's report dated April 2003, with change pages dated April 25, 2004. We discuss these exceptions below.

Regarding the tax refund issue, the City and PAWW agreed to reduce PAWW's rate base by $34,405, which corresponds to the parties' estimates for tax refund amounts that could have been used for plant additions in year 1996 through 1999.

The parties also stipulated that should the Commission authorize rate recovery of any of the amounts recorded in the memorandum account for rate case expenses, such recovery would be over six years. Legal counsel costs after January 7, 2004, would be excluded from the memorandum account.

PAWW further agreed to submit an advice letter requesting Commission authorization to extend its service territory boundaries to include the Hay Industrial Park and adjoining property. PAWW will also notify potential customers that they have the option to contract with service providers other than PAWW for connection work, subject to inspection by PAWW. The parties also agreed that properties listed as "Inactive Meters Not In Service But In Place 1 Jan 03" shall not be charged facilities fees unless additional services or increases in connection size are requested by the property owners.

The parties did not reach agreement on the issue of refunds for overcharges to 5/8 x 3/4 inch meter customers. The parties did, however, agree to an expedited process for the Commission to resolve the issue. The parties stated that the overcharges occurred over an approximately 10-year period and that PAWW has refunded all overcharges for the last three calendar years (1999, 2000, and 2001) preceding this application. PAWW believes that it has discharged its legal obligation to make refunds, and the City believes that all improperly collected funds should be refunded. The parties agreed that should any further refunds be required, they should be used as an offset to the memorandum account discussed above. The parties agreed to brief the issue and that they "will not attempt to otherwise influence the Commission's decision." We resolve the overcharge issue below.

C. Discussion

1. Settlement Criteria

The stipulation is properly characterized as an uncontested settlement.[1] In such cases, the Commission applies the standard set forth in Rule 51.1(e) of the Commission's Rules of Practice and Procedure, and applicable to both contested and uncontested settlement agreements, requires that the "settlement is reasonable in light of the whole record, consistent with law, and in the public interest."

The proposed stipulation was primarily negotiated between PAWW and the City, and mediated by the Director of the Commission's Water Division.

[1] The Commission's Water Division participated in the proceeding but did not contest the stipulation.

PAWW was represented by its officers and counsel in the proceeding. On behalf of ratepayers, the City was represented by its Mayor and counsel. Both parties were actively involved in all phases of the proceeding. Thus, the sponsoring parties for the stipulation are fairly representative of the affected interests, and they have been active advocates in this proceeding.

The stipulation sets forth the parties' final agreement on major issues, including Summary of Earnings, Tariff Rate Schedules, Comparison of Rates, and Adopted Quantities and Tax Calculations prepared by Water Division staff to reflect the rate-making provisions of the stipulation.

Pub. Util. Code § 454[2] provides that no public utility shall change any rate except upon a showing before the Commission and a finding by the Commission that the new rate is justified. In the stipulation and earlier filings, the parties have explained their initial positions and what adjustments have been made to arrive at the summaries of earning and revenue requirements set forth in the stipulation. The resulting rates will produce necessary and sufficient revenues for the test year. We find that the rates and the supporting revenue requirements are justified by the parties' showing and are in the interest of ratepayers and the public. Also, as indicated by the description of the stipulation, the documentation is sufficient for the Commission to discharge its future regulatory obligations with respect to the parties and their interest. (See *San Diego & Electric,* 46 CPUC 2d 538, 550-55 (1992.)

The stipulation satisfies the Commission's requirements for settlements under Rule 51. The stipulation is reasonable in consideration of the whole

[2] All statutory references are to the Public Utilities Code.

record, consistent with the law, and in the public interest. We will therefore approve it.

2. The Overcharge Issue

There is no dispute that PAWW overcharged the 5/8 x 3/4 inch meter customers for approximately 10 years, and refunded the overcharges for only three years. PAWW contends it owes no further refunds, pursuant to the three-year limitation period found in § 736.[3] The City argues that this statute of limitations does not apply when customers have not discovered the billing error. We find that PAWW's customers could not reasonably be expected to discover the overcharges through sources available to them and that consequently the statute of limitations was tolled until PAWW discovered the error and informed the Commission of the overcharges in 2000. As a result, the three-year limitations period does not bar any refunds in this proceeding initiated in 2002, and PAWW must provide a full refund of overcharges, plus interest, going back to 1991.

In Res. W-4356, the Commission addressed the overcharge issue as follows:

> - In its investigation, the staff discovered that upon implementing its newly authorized rates pursuant to Res. W-3594, dated June 19, 1991, PAWW began incorrectly assessing its 5/8 X 3/4-inch metered customers with the ¾ -inch metered service charge rate, an initial overcharge of $3.15 per month per customer

[3] Section 736 requires that "[a]ll complaints for damages arising from the violation of any of the provisions of Sections 494 or 532 shall either be filed with the commission, . . . [or] any court of competent jurisdiction within three years from the time the cause of action accrues, and not after." (Emphasis added.)

> ($15.20 versus $12.05). The utility assessed this incorrect rate up until the interim rates authorized by Res. W-4308 were implemented in January 2002. It may be that the incorrect billing was inadvertent on the part of PAWW. However, even though the Staff's audit shows that PAWW has been losing money since 1994 (even with the incorrect billing), the utility still was in violation of Section 532 of the Pub. Util. Code. Therefore, the Division recommends that PAWW be required to refund three years (1999, 2000 and 2001) of the over-collection to each affected customer over a twelve-month period. This is consistent with Section 736 of the Pub. Util. Code that limits the claim for damages resulting from violations of any of the provisions of Section 532 of the Code to three years. The total over-collection from January 1, 1999 through December 31, 2001 was $17,965. The utility agrees with the reasonableness of this refund.

Accordingly, the Commission ordered PAWW to provide overcharge credits for 1999, 2000, and 2001 to the affected customers in installments of $9.57 per month for twelve months commencing with the first billing after the effective date of new rates authorized in the resolution. The Resolution is subject to modification consistent with the final opinion in this application.

In its opening brief, PAWW concurs with the staff report and the Resolution that § 736 limits PAWW's refund obligation to three years. By charging rates other than as set forth in its tariffs, PAWW violated § 532, which provides that "no public utility shall charge or receive a different compensation for any . . . service to be rendered, than the rates, tolls, rentals and charges applicable thereto as specified in its schedules on file and in effect at the time." PAWW concludes that by refunding the last three years of overcharges, it has fully discharged its refund obligation.

The City argues that PAWW's customers are legally entitled to recover refunds from PAWW from the beginning of the period in which these customers were overcharged, approximately seven additional years of refunds. The City contends that the statute of limitations found in § 736 is tolled "until ratepayers become aware, or should become of aware, of their injury" and that the Commission has consistently interpreted § 736 as being subject to this "discovery rule." The City points to *TURN v. Pacific B*ell, (1994) 54 CPUC2d 122, where the Commission applied the discovery rule and found that the otherwise applicable statute of limitations was not a bar to the refund of late payment fees charged over five years that were caused by Pacific Bell's "wrongdoing" in crediting payments.

The City is correct that the Commission applies the discovery rule in determining the impact of the statutes of limitations applicable to overcharge claims. In *TURN*, the Commission cited a 1988 California Supreme Court decision to explain that the limitations "clock" does not always begin to "tick" at the time that the injury is suffered:

> - The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her. (54 CPUC at 126, quoting Jolly v. Eli Lily Co. (1988) 44 Cal. 3d 1103).

TURN also explained that, in determining the timing of the onset of the statute of limitations, "[w]here a utility knew or should have known that it was overcharging its customers, the benefit of the doubt must go to customers." (54 CPUC 2d at 125).

Applying the discovery rule to this case, the statute of limitations did not begin to run on claims for refund of overcharges until PAWW's customers were aware of the overcharges or could reasonably discover the overcharges through sources available to them. The sparse record here does not support the position that customers should reasonably have discovered that they were being overcharged prior to 2002. In fact, PAWW's briefs do not even argue that customers should have known they were being overcharged, but rather dwell on the unconvincing argument that the discovery rule should not apply in this case.

The bill itself did not give customers a reason to suspect they were being overcharged. As shown by the attachments to the City's brief, PAWW's bills only showed a total charge "for usage," which apparently was a bundled figure comprising both the fixed service charge based on meter size and the charges for quantity of water consumed. Thus, the bills furnished customers no basis to know or suspect that their bills included a monthly service charge based on meter size. PAWW's pleadings do not provide any information indicating that customers were otherwise informed that meter size affected the amount a customer was billed.

However, even assuming an enterprising customer inspected the tariffs and learned that a larger meter carried a higher monthly service charge, the record still does not show that such a customer could reasonably be expected to have become aware of the overcharge. PAWW does not argue that the meter itself provides any indication of its size. Nor does PAWW provide any reason to believe that a customer who called PAWW between 1991 and 2000 to inquire about the size of their meter would have been given an answer that conflicted with the (erroneous) meter size for which the customer was being billed. In the absence of any information from the company, we give the benefit of the doubt

to the customer and conclude that the company's answer would be consistent with the amount being billed.

We note PAWW's statement that the company had been charging excessive rates for nine years before becoming aware of the overcharges. The fact that it took the company nine years to discover the overcharges supports our finding that it was not reasonable to expect a customer to discover the facts exposing the overcharges.

Our decision in *Homeowners Assn of Lamplighter v. Lamplighter Mobile Home Park*, (1999) 84 CPUC 2d 727, 731 (D.99-02-001), does not dictate a contrary result. In *Lamplighter*, the mobile home park owners had assessed an illegal surcharge for facilities improvements for over 10 years. The owners provided notice of the surcharge at issue and the detailed factual basis for it in a letter to tenants four months prior to assessing the surcharge, as well as in a community meeting. (84 CPUC 2d at 733, 734). Unlike PAWW's customers, *Lamplighter's* customers "had all of the critical facts at their disposal." (84 CPUC 2d at 733). They were lacking only an understanding of the law that made such surcharges improper. The Commission held that the discovery rule does not allow the statute of limitations to be tolled based on ignorance of the law, stating: "*TURN v. Pacific Bell* does not stand for the principle that a statute of limitations is tolled when a party does not understand its legal rights." 84 CPUC 2d at 733.

In contrast to Lamplighter, PAWW's customers lacked the facts necessary to establish that they were being overcharged and could not reasonably have discovered such facts. Accordingly, we find that the statute of limitations was tolled until the company discovered the overcharges and notified the Commission in 2000. Because this proceeding was initiated in 2002, less than

three years after the statute of limitations began to run, the statute of limitations does not bar refunds of any of the overcharges.

As noted above, the stipulation sets forth a process by which customers will benefit from any additional refunds we may order:

> - To the extent that the Commission determines that Applicant is obliged to provide additional refunds, Applicant and Protestant agree and respectfully request that the Commission authorize that said refunds be charged against or deducted from any surcharges authorized for recovery of the Memorandum Account discussed in paragraph 4 above [relating to PAWW's legal and other expenses in this rate case]. (Stipulation, Paragraph 5).4

In accordance with the stipulation, we direct that the additional refunds ordered by this decision be used to offset any surcharge amounts that may be authorized pursuant to paragraph 4 of the stipulation. In the event that the additional refund amount exceeds the paragraph 4 surcharge amounts, PAWW shall consult with the Commission's Water Division to prepare a proposal for the refund of those additional amounts and shall file an advice letter seeking approval of such proposal.

D. Comments on Draft Decision

The alternate draft decision of Commissioner Lynch was mailed on August 5, 2004, pursuant to Public Utilities Code Section 311 (e). Opening comments were filed by PAWW and the City. PAWW filed reply comments on

[4] The stipulation also provides that neither PAWW nor the City will seek rehearing, reconsideration, or appeal of our decision regarding whether additional refunds are owed. (Paragraph 5).

August 14, 2004. The comments have been fully considered and changes, based on those comments, have been made where appropriate.

E. Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. PAWW's last general rate case was in 1991.
2. Since some time after 1991, PAWW's rates have failed to generate sufficient revenue to meet reasonable expenses.
3. PAWW received extraordinary revenue in the form of income tax refunds over a multi-year period ending in 1995.
4. PAWW did not seek Commission direction as to the disposition of the income tax refunds.
5. PAWW and the City entered into a stipulation that resolved all but one issue in this proceeding.
6. The stipulation is unopposed.
7. The stipulating parties are fairly reflective of the affected interests in this proceeding.
8. No term of the stipulation contravenes statutory provisions or prior Commission decisions.
9. The stipulation conveys sufficient information to permit the Commission to discharge its future regulatory obligations with respect to the parties and their interests.
10. PAWW overcharged its 5/8 x 3/4 inch meter customers for approximately 10 years, and has refunded the overcharges for 1999, 2000, and 2001.

11. PAWW does not assert that its customers should have been expected to discover the overcharges before 2000.

12. PAWW has not presented information indicating that customers should have been aware of the actual size of their meters or that PAWW would have informed customers of the correct meter size if customers had contacted the utility.

13. The record shows that customers could not reasonably be expected to have discovered the overcharges before PAWW discovered the overcharges and notified the Commission in 2000.

Conclusions of Law

1. The stipulation is an uncontested settlement as defined in Rule 51(f).

2. The stipulation is reasonable in consideration of the whole record, consistent with law, and in the public interest.

3. The stipulation should be adopted.

4. Section 736 provides that all claims against a public utility must be filed within three years.

5. The three-year statute of limitations in section 736 was tolled from 1991 to 2000 because customers could not reasonably be expected to discover the overcharges during that period.

6. The statute of limitations does not bar any claims for refunds in this case.

7. PAWW should make additional refunds, plus interest, going back to when the overcharges began in 1991.

FINAL ORDER

IT IS ORDERED that:

1. The stipulation between Point Arena Water Works (PAWW) and the City of Point Arena, filed April 8, 2004, is approved and adopted. The parties shall comply with all provisions of the stipulation.

2. PAWW shall file the advice letter described in paragraph 4 of the stipulation within 60 days of the date of issuance of this decision.

3. In accordance with paragraph 5 of the stipulation, the additional refunds ordered by this decision shall be used to offset any surcharge amounts that may be authorized pursuant to paragraph 4 of the stipulation. In the event that the additional refund amount exceeds the paragraph 4 surcharge amounts, PAWW shall consult with the Commission's Water Division to prepare a proposal for the

refund of those additional amounts and shall file an advice letter seeking approval of such proposal.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California